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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 654

McGORDON SOUTHALL
T/A SOUTHALL REALTY CO.,

Petitioner

v.

LILLIE BROWN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 11) is reported at 237 A.2d 834; that Court's

order on rehearing (Pet. App. 16) is unreported.

The order denying the petition for leave to appeal to the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 17) also is unreported.

JURISDICTION

The order of the United States Court of Appeals denying leave to appeal was entered on July 16, 1968. The petition for a writ of certiorari was filed on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATUTES AND REGULATIONS INVOLVED

D.C. Code §1-226 provides:

The Commissioners of the District of Columbia are hereby authorized and empow-

ered to make and enforce all such reasonable and usual police regulations in addition to those already made under sections 1-224, 1-225, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia.

The Housing Regulations of the District of Columbia provide, in pertinent part:

Section 2101 -- Purpose of Regulations

The Commissioners of the District of Columbia hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted, and that there are, in addition, other such buildings and areas within said District which are deteriorating and are in danger of becoming slums or otherwise blighted unless action is taken to prevent their further deterioration and decline.

The Commissioners further find and declare that such unfortunate conditions are due, among other circumstances, to certain conditions affecting such residential buildings and such areas, among them being the following: dilapidation, inadequate maintenance, overcrowding, inadequate toilet facilities, inadequate bathing or washing facilities, inadequate heating, insufficient protection against

fire hazards, inadequate lighting and ventilation, and other insanitary or unsafe conditions.

The Commissioners further find and declare that the aforesaid conditions, where they exist, and other conditions which contribute to or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare and morals of the community and its inhabitants.

The Commissioners, accordingly, promulgate these regulations for the purpose of preserving and promoting the public health, safety, welfare, and morals.

Section 2301 -- Use and Occupancy

No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations.

Section 2304 -- Rental Units

No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin.

Section 2501 -- General Maintenance and Repair

Every premises accommodating one or more habitations shall be maintained and

kept in repair so as to provide decent living accommodations for the occupants. This part of this Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.

QUESTION PRESENTED

Whether, by promulgating certain Housing Regulations, the Commissioners of the District of Columbia either exceeded their authority "to make and enforce * * * reasonable and usual police regulations * * *" or contravened the Contract Clause of the Constitution.[1/]

1/ Since petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254, the only question presented may be (at most) whether the Court of Appeals abused its discretion in denying the petition for allowance of appeal. For purposes of this opposition, however, we treat the denial of review as if it were a decision on the merits "in" the Court of Appeals.

STATEMENT OF THE CASE

In 1955, the Commissioners of the District of Columbia promulgated Housing Regulations which established minimal standards of habitability for residential property.[2/] Some ten years later, petitioner, as agent for an owner, leased a dwelling in the District to respondent. At the time that petitioner made his contract with respondent, he was "on notice that certain Housing Code violations existed on the premises"; these violations "were of a nature to make the 'habitation' unsafe and unsanitary." 237 A.2d at 836.

2/ The Regulations relate generally to cleanliness and sanitation, maintenance and repair, and the provision of such facilities, utilities, and services as heating and lighting.

Several months after respondent had taken possession of the premises, petitioner filed this suit, seeking to evict respondent because of her failure to make certain rent payments. Respondent conceded that she had not made those rent payments, but maintained that she was not obliged to do so because, inter alia, the rental contract which petitioner sought to enforce was illegal. The trial court upheld the contract, entering judgment for the petitioner.

The District of Columbia Court of Appeals reversed. Noting that "the lease contract was * * * entered into in violation of the Housing Regulations requiring that they be safe and sanitary and that they be properly maintained," the Court

held that the illegal lease would not be enforced, for reasons of public policy (237 A.2d 837):

> To uphold the validity of this lease agreement, in light of the defects known to be existing on the leasehold prior to the agreement * * * would be to flout the evident purposes for which Sections 2304 and 2501 were enacted.

On petitioner's application for rehearing, the Court -- after entertaining supplemental briefs and hearing re-argument -- adhered to its original determination (Pet. App. 16):

> that where the owner of a dwelling property, knowing that Housing Code violations exist on the property which render it unsafe and unsanitary, executes a lease for the property, such lease is void and cannot be enforced.

Petitioner then filed a petition for allowance of appeal in the United States

Court of Appeals for the District of Columbia Circuit. From the denial of that petition, petitioner now seeks review in this Court.

ARGUMENT

There can be no doubt -- and petitioner apparently concedes -- that the Commissioners of the District of Columbia were authorized to promulgate substantive Housing Regulations, and that the rental contract here in issue violated those Regulations. Petitioner's attack is directed to the consequences of that illegality: he challenges the holding of the District of Columbia Court of Appeals that because the rental contract was illegal, he cannot enforce it in the District of

Columbia courts. Seeking to frame "special and important" issues for this Court, petitioner argues that the Commissioners have acted in excess of their statutory and Constitutional authority by "declaration of public policy" and "declaring contracts void" (Pet. 7). These arguments are totally without merit.

1. By Joint Resolution of February 26, 1892 (27 Stat. 394), Congress authorized the Commissioners

> to make and enforce all such reasonable and usual police regulations * * * as they may deem necessary for the protection of lives, limbs, health, comfort and quiet....

There could be no serious question that this invested the Commissioners with sufficient authority to determine that poor housing conditions threaten the public

weal, necessitating the establishment and enforcement of housing standards. See Baltimore and Ohio Railroad Co. v. District of Columbia, 10 App. D.C. 111, 126; Filippo v. Real Estate Commission, 289 F.2d 557, 53 App. D.C. 159; 5 McQuillin, Municipal Corporations (3d ed. 1949) §§ 16.05, 16.07. Thus, the Commissioners could, if they would, have originated Section 2101 (supra, p. 3) and the implementing regulations.[3/]

3/ See Guardolo, "Housing Codes in Urban Renewal," 25 Geo. Wash. L. Rev. 1 and Camara v. Municipal Court, 387 U.S. 523, 535:

> Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.

But the Commissioners' authority to act on their own initiative is not even in issue here, for the Housing Regulations were promulgated pursuant to explicit direction of Congress. The Commissioners' declaration in Section 2101 that the Regulations were needed "for the purpose of preserving and promoting the public health, safety, welfare, and morals" is not an independent declaration of public policy; it is simply a restatement of Congress' determination, in D.C. Code §5-701, that it is

> a matter of legislative determination that * * * conditions existing in the District of Columbia with respect to substandard housing and blighted areas * * * are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect

> and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose * * *. 4/

Indeed, the reason why the District of Columbia -- and some 3,000 other localities -- have Housing Regulations is that such regulations are a prerequisite to obtaining federal funds for urban renewal, public housing and mortgage financing

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4/ For a "similar expression of a community policy on the national level," see 50 Stat. 888 as amended, 42 U.S.C. 1401, and 63 Stat. 413 as amended, 42 U.S.C. 1441. Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 949 n. 14, 108 U.S. App. D.C. 385, 391 n. 14.

programs.[5/] Thus, the "declaration of public policy" of which petitioner complains was made not by the Commissioners, but by the Congress, whose power to do so is not in question. There is no basis whatever for an argument that Congress did not intend the District

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5/ By the Housing Act of 1954 (68 Stat. 623 as amended, 42 U.S.C. 1451(c)), Congress refused to expend any such funds in any locality which lacked "a workable program for community improvement." The Housing and Home Finance Agency, responsible for administration of the Act, defined "workable program" to include housing codes. HHFA stated that "The Housing Code is so important that a locality will be expected to have adopted and put such code into effect by December 31, 1955, in order to have a continued certification of its 'Workable Program'" HHFA, How Localities Can Develop a Workable Program for Urban Renewal (Sept. 15, 1954), p. 6. See Johnstone,The Federal Urban Renewal Program, 25 U.Chi.L.Rev. 301, 337. There were some 2,936 "Workable Programs" as of Dec. 31, 1966. 1966 Stat. Yearbook, U.S.Dept. of Hous. & Urban Dev.

of Columbia to use this tool for public protection; on the contrary, the legislation which we have reviewed makes it perfectly clear that Congress affirmatively intended that the District have a Housing Code and that the Commissioners promulgate it.

2. The short answer to petitioner's challenge to the Commissioners' authority to "declare his contract void" is that they have not done so: the determination of unenforceability was made by the District of Columbia Court of Appeals, not by the Commissioners. While Sections 2301 and 2304 of the Regulations are at the least susceptible of the interpretation that they invalidate such illegal contracts, the District of Columbia Court of Appeals

rested its decision not upon them but upon the general rule that a contract "made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer." Hartman v. Lubar, 133 F.2d 44, 45, 77 U.S. App. D.C. 95, 96, certiorari denied, 319 U.S. 767; Miller v. Ammon, 145 U.S. 421. Thus, petitioner's arguments are beside the point, for the Court's power to refuse enforcement is limited neither by D.C. Code 1-226 nor by the Contract Clause.[6/] The Commissioners' Regulations

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6/ We question whether District of Columbia regulations are subject to the Contract Clause, which "relates to state action only." United Transport Service v. National Mediation Board, 179 F.2d 446, 85 U.S. App. D.C. 352, 358. Moreover, "it has been settled by a long line of decisions, that the [Contract Clause] . . . is directed only against impairments by legislation and not (footnote 6 continued)

are the basis of the holding below only because the District of Columbia Court of Appeals determined that "the sanction of unenforcement is consistent with and essential to effectuating the public policy" that informs the Regulations. United States v. Mississippi Valley Co., 364 U.S. 520, 563.

3. Petitioner's quarrel is not, in truth, with the Regulations that the Commissioners have promulgated; his complaint is that the courts have given force

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(footnote 6 continued)
by judgments of courts...." Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451; Barrows v. Jackson, 346 U.S. 249, 260. In no event could the Housing Regulations be held to impair the obligation of petitioner's contract, which was executed more than ten years later: "Contracts made after the law was in force of course are made subject to it, and impose only such obligations and create only such property as the law permits." Abilene Nat'l Bank v. Dolley, 228 U.S. 1, 5.

to those Regulations by declining to implement a contract that flouted them. Petitioner has framed his case in terms designed to appeal to this Court -- excess of delegated authority and contravention of the Contract Clause; but those arguments do not fit the facts: they are addressed to legislative, not judicial, acts.

The essence of petitioner's argument is that the District of Columbia Court of Appeals was in some sense wrong in deciding that it would not allow enforcement of petitioner's plainly illegal contract. This argument fails for several reasons: first, because petitioner knew what the law was when he made his contract, and violated it at his peril; second because the law that petitioner violated is important to the protection of the public

weal.[7] Petitioner cannot complain that he has been held to that law: "in no case does the owner of property acquire immunity against exercise of the police power.... The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." Block v. Hirsh, 256 U.S. 135, 155.

The decision of the District of Columbia Court of Appeals determines a question of local law that has nothing to do with the authority of the District's

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7/ "The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government." Frank v. Maryland, 359 U.S. 360, 371.

Commissioners. The decision is consistent with and compelled by a long line of cases descending from Bank of the United States v. Owens, 2 Pet.(27 U.S.) 527. It discomfits only those who deliberately ignore and violate the laws regulating the rental of real property. There is no occasion for review in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Respondent in Opposition were served by first-class mail, postage prepaid, upon Messrs. Miller and Urciolo, 400 Fifth Street, N. W., Washington, D. C. 20001, on this 27th day of November, 1968.

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